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FONG KONG MENG & ANOR v. PP

FEDERAL COURT, PUTRAJAYA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
ALIZATUL KHAIR OSMAN FCJ
MOHD ZAWAWI SALLEH FCJ
B ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPLICATION NO: 05(RJ)-4-11-2018(B)]
20 JUNE 2019

C ***CRIMINAL PROCEDURE:*** *Revision – Application for – Application to Federal Court to review decision of its earlier panel – High Court convicted applicants for offence of murder under s. 302 of Penal Code and sentenced both to death – Conviction and sentence affirmed by Court of Appeal – Earlier panel found case under s. 300(d) of Penal Code not made out against applicants – Earlier panel found*
D *applicants guilty of culpable homicide – Earlier panel set aside conviction and sentence under s. 302 of Penal Code and substituted with conviction under s. 304(a) of Penal Code – Applicants sentenced to 20 years' imprisonment – Whether earlier panel correct in arriving at decision – Whether decision illegal – Powers of Federal Court in criminal appeals – Whether same as High Court and Court of Appeal –*
E *Powers of Federal Court to review its decision – Courts of Judicature Act 1964, s. 86 – Penal Code, ss. 299, 300(d), 302, 304(a) & 304(b)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – High Court convicted accused persons for murder under s. 302 of Penal Code and sentenced both to death – Conviction and sentence affirmed by Court of Appeal –*
F *Federal Court found case under s. 300(d) of Penal Code not made out against accused persons – Federal Court found accused persons guilty of culpable homicide – Federal Court set aside conviction and sentence under s. 302 of Penal Code and substituted with conviction under s. 304(a) of Penal Code – Accused persons sentenced to 20 years' imprisonment – Whether Federal Court correct in arriving at decision –*
G *Whether decision illegal – Penal Code, ss. 299, 300(d), 302, 304(a) & 304(b)*

The applicants were convicted and sentenced to death by the High Court, for an offence under s. 302 of the Penal Code ('PC'), following the murder of their maid through long period of abuse, neglect and starvation. In proving its case at the High Court, the prosecution relied on s. 300(d) of the PC. As
H their appeal to the Court of Appeal was unsuccessful, the applicants appealed to the Federal Court. An earlier panel (i) found that a case, under s. 300(d) of the PC, had not been made out against the applicants and, instead, found the applicants guilty of culpable homicide; (ii) set aside the conviction and sentence, under s. 302 of the PC, but substituted the same with a conviction
I under s. 304(a) of the PC; and (iii) sentenced the applicants to 20 years' imprisonment. Hence, the present application, pursuant to r. 137 of the Rules of the Federal Court 1995, to review and set aside the conviction and sentence handed down by the earlier panel. In support of their application,

the applicants argued that (i) when the earlier panel found that s. 300(d) of the PC was not proved, the applicants could not be found guilty of culpable homicide, under s. 304(a), which speaks of intention and not knowledge, as required in s. 300(d); (ii) the applicants should be found guilty under s. 304(b) of the PC, which also speaks of 'knowledge', as provided for in s. 300(d) of the PC; and (iii) since the whole foundation of the prosecution's case and the rationale of both the High Court and Court of Appeal were premised on 'knowledge', pursuant to s. 300(d) of the PC, the earlier panel, in reducing the charge against the applicants, could only consider a substitution of conviction and sentence under s. 304(b), and not s. 304(a), of the PC.

Held (dismissing application)
Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) Section 86 of the Courts of Judicature Act 1964 ('CJA') is clear in that in criminal appeals, the Federal Court possesses the same powers as the High Court and the Court of Appeal. This means the Federal Court is duty-bound, as in all criminal appeals, to evaluate the facts in its totality and then make a determination as to whether the conviction is safe. If the Federal Court finds the conviction unsafe, it is then duty-bound to make a determination whether the evaluated facts justify a conviction under another provision of the PC, *to wit*, another criminal offence. (para 19)

(2) Section 299 of the PC consists of three limbs: (i) with the intention of causing death; (ii) with the intention of causing bodily injury as is likely to cause death; or (iii) with the knowledge that he is likely, by such act, to cause death. The earlier panel evaluated the evidence again as they were empowered to do so, under s. 86 of the CJA, in order to find guilt either under limb (1), (2) or (3) of s. 299 of the PC. If it was an offence under limb (1) or (2), then it would draw punishment under s. 304(a) of the PC. If it was a limb (3) offence, then it would draw punishment under s. 304(b) of the PC. (paras 21 & 22)

(3) The ingredients set out in ss. 299 and 300 of the PC vary in degree. One results in culpable homicide while the other is culpable homicide amounting to murder. Different considerations apply to each offence. The court's mind must then focus on the totality of the evidence to determine which limb in s. 299 of the PC the accused could be found guilty of. Whatever discussions relating to the ingredients of s. 300(d) of the PC at the High Court and Court of Appeal were no longer of relevance in the process of determining guilt under s. 299 of the PC for culpable homicide. The earlier panel eventually found that a s. 304(a) conviction was an appropriate sentence. What the earlier panel did was perfectly in order. (paras 23 & 24)

(4) The case of *Soh Chew Thong & Anor v. PP* was heavily relied on by the applicants. Every decision of the courts depends substantially on the peculiarity of each case as the facts would invariably be different and subject to different inferences leading to different opinions of the courts. Even if the facts are the same, the Federal Court is entitled to make a fresh finding of fact in a guilt finding process. Further, the Federal Court is not bound by its own earlier decision especially when the appeal relates to finding of facts. (para 26)

(5) The applicants had been sentenced to 20 years' imprisonment instead of a death sentence. Taking into consideration the cruel treatment by one human being to another, which eventually led to an untimely and tragic death of the latter, any reasonable tribunal would find the aforesaid imposed sentence to be appropriate as it reflected squarely on the seriousness of the offence. The applicants had the benefit of three court hearings and legal representations. Therefore, one could not say that there had been a miscarriage of justice. There was no error on the part of the earlier panel. Rather, the error laid on the part of the applicants who saw the nexus as between ss. 304 and 300 of the PC when, in fact, the true nexus only existed between ss. 304 and 299 of the PC. The language employed by the drafters in s. 299 of the PC could not be clearer in terms of stipulating which offence it had legislated to provide punishments for. Section 304 of the PC had nothing to do with s. 300 of the PC. It had everything to do with s. 299 of the PC. (paras 27 & 28)

Bahasa Malaysia *Headnotes*

Pemohon-pemohon disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi, atas pertuduhan bawah s. 302 Kanun Keseksaan ('KK'), ekoran pembunuhan pembantu rumah mereka melalui penderaan, pengabaian dan kelaparan bertempoh panjang. Dalam membuktikan kesnya di Mahkamah Tinggi, pihak pendakwaan bersandar pada s. 300(d) KK. Oleh kerana rayuan mereka di Mahkamah Rayuan tidak berjaya, pemohon-pemohon merayu di Mahkamah Persekutuan. Panel terdahulu (i) mendapati satu kes, bawah s. 300(d) KK, gagal dibuktikan terhadap pemohon-pemohon dan, sebaliknya, mendapati pemohon-pemohon bersalah atas homisid salah; (ii) mengetepikan sabitan dan hukuman, bawah s. 302 KK, tetapi menggantikannya dengan satu sabitan bawah s. 304(a) KK; dan (iii) menjatuhkan hukuman penjara 20 tahun atas pemohon-pemohon. Maka timbul permohonan ini, bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995, untuk menyemak semula dan mengetepikan sabitan dan hukuman yang dijatuhkan panel terdahulu. Menyokong permohonan mereka, perayu-perayu menghujahkan (i) apabila panel terdahulu mendapati s. 300(d) gagal dibuktikan, pemohon-pemohon tidak boleh didapati bersalah atas homisid salah, bawah s. 304(a), yang menyatakan tentang niat dan bukan pengetahuan, seperti yang dikehendaki bawah s. 300(d); (ii) pemohon-

pemohon sepatutnya didapati bersalah bawah s. 304(b) KK, yang juga menyebut tentang 'pengetahuan', seperti yang diperuntukkan bawah s. 300(d) KK; dan (iii) oleh kerana keseluruhan asas kes pendakwaan dan rasional kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan adalah berdasarkan 'pengetahuan', bawah s. 300(d) KK, panel terdahulu, dalam mengurangkan pertuduhan terhadap pemohon-pemohon, hanya boleh mempertimbangkan penggantian sabitan dan hukuman bawah s. 304(b), dan bukan s. 304(a) KK.

Diputuskan (menolak permohonan)
Oleh David Wong Dak Wah HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Seksyen 86 Akta Mahkamah Kehakiman 1964 ('AMK') jelas memperuntukkan bahawa dalam rayuan-rayuan jenayah, Mahkamah Persekutuan mempunyai kuasa yang sama dengan Mahkamah Tinggi dan Mahkamah Rayuan. Ini bermakna Mahkamah Persekutuan berkewajipan, seperti dalam semua rayuan jenayah, menilai fakta secara menyeluruh dan kemudian membuat keputusan sama ada sabitan tersebut selamat. Jika Mahkamah Persekutuan mendapati sabitan tidak selamat, Mahkamah Persekutuan berkewajipan membuat keputusan sama ada fakta yang dinilai mewajarkan sabitan bawah peruntukan lain KK, iaitu kesalahan jenayah yang lain.

(2) Seksyen 299 KK bercabang tiga, iaitu: (i) dengan niat menyebabkan kematian; (ii) dengan niat menyebabkan kecederaan pada tubuh badan yang berkemungkinan menyebabkan kematian; atau (iii) dengan pengetahuan bahawa dia berkemungkinan, dengan tindakan tersebut, menyebabkan kematian. Panel terdahulu menilai semula keterangan kerana mereka mempunyai kuasa berbuat demikian, bawah s. 86 AMK, untuk mendapati kebersalahan sama ada bawah cabang (i), (ii) atau (iii) s. 299 KK. Jika satu kesalahan bawah cabang (i) atau (ii), ini akan membangkitkan hukuman bawah s. 304(a) KK. Jika satu kesalahan bawah cabang (iii), ini akan membangkitkan hukuman bawah s. 304(b) KK.

(3) Inti pati yang dinyatakan dalam ss. 299 dan 300 KK berbeza tahapnya. Satu mengakibatkan homisid salah manakala satu lagi homisid salah yang terjumlah sebagai pembunuhan. Pertimbangan-pertimbangan berbeza terpakai pada setiap kesalahan. Minda mahkamah harus fokus pada keseluruhan keterangan untuk menentukan cabang manakah, bawah s. 299 KK yang tertuduh boleh didapati bersalah. Apa-apa perbincangan tentang inti pati s. 300(d) KK dan Mahkamah Rayuan tidak lagi relevan dalam proses menentukan kebersalahan bawah s. 299 KK untuk homisid salah. Panel terdahulu akhirnya mendapati satu sabitan bawah s. 304(a) adalah hukuman yang lebih sesuai. Panel terdahulu telah melakukan sesuatu yang amat teratur.

(4) Pemohon-pemohon berpaut kuat pada kes *Soh Chew Thong & Anor v. PP*. Setiap keputusan mahkamah bergantung besar pada keunikan satu-satu kes kerana pelbagai fakta berbeza dan tertakluk pada inferens berbeza yang mendorong pada pelbagai beza pendapat mahkamah. Jika pun faktanya sama, Mahkamah Persekutuan berhak membuat dapatan fakta baharu dalam proses mendapati kebersalahan. Selanjutnya, Mahkamah Persekutuan tidak terikat dengan keputusan terdahulunya, khususnya apabila rayuan tersebut berkaitan dapatan fakta.

(5) Pemohon-pemohon dijatuhkan hukuman penjara 20 tahun dan bukan hukuman mati. Mengambil kira layanan kejam seorang insan terhadap insan lain, yang seterusnya menyebabkan kematian penuh tragedi pada usia muda, mana-mana tribunal munasabah akan mendapati hukuman yang dijatuhkan sesuai kerana mencerminkan keseriusan kesalahan tersebut dengan tepat. Pemohon-pemohon memperoleh manfaat tiga perbicaraan mahkamah dan pewakilan guaman. Oleh itu, tidak boleh dikatakan bahawa terdapat kesilapan mahkamah. Tiada kekhilafan oleh mahkamah terdahulu. Sebaliknya, pemohon-pemohon yang terkhilaf kerana melihat kaitan antara ss. 304 dan 300 KK sedangkan, hakikatnya, kaitan yang sebetulnya wujud antara ss. 304 dan 299 KK. Bahasa yang diguna oleh penggubal dalam s. 299 KK sangat jelas dalam memperuntukkan kesalahan yang digubal untuk memperuntukkan hukuman. Seksyen 304 KK tiada kaitan dengan s. 300 KK. Seksyen 304 KK sama sekali berkait dengan s. 299 KK.

Case(s) referred to:

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal [2013] 4 CLJ 901 FC ***(refd)***

Kerajaan Malaysia v. Semantan Estates (1952) Sdn Bhd [2019] 2 CLJ 145 FC ***(refd)***

Rupa Ashok Hurra v. Ashok Hurra (2002) 4 Supreme Court Cases 388 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 86

Federal Constitution, arts. 5, 8

Penal Code, ss. 34, 299, 300(d), 302, 304(a), (b)

Rules of the Federal Court 1995, r. 137

For the applicants - Gopal Sri Ram, Hisyam Teh Poh Teik & Guok Ngek Seong

For the respondent - Roslan Mat Nor & Tetralina Ahmad Fauzi; DDPs

[Editor's note: For the High Court judgment, please see Fong Kong Meng lwn. PP & Rayuan Lain [2016] 1 LNS 1490 (varied).]

Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah CJ (Sabah & Sarawak):

Introduction

[1] The applicants made this application under r. 137 of the Rules of the Federal Court 1995 ("r. 137") to review and set aside the conviction and sentence under s. 304(a) of the Penal Code ("Code") handed down by an earlier panel of the Federal Court on 4 April 2018 ("earlier panel"). Alternatively, the applicants are seeking for the case to be reheard before the Federal Court.

[2] The applicants' premise is that the earlier panel had caused a miscarriage of justice when they set aside the conviction and sentence under s. 302 of the Code and substituted it with a conviction and sentence under s. 304(a) of the Code instead of under s. 304(b) of the same.

[3] We heard the appeal on 16 May 2019 and reserved judgment. We have carefully reconsidered submissions of respective counsel and we now deliver our decision and grounds.

The Background Facts

[4] The salient facts are these. The applicants were jointly charged for murder under s. 302 of the Code before the High Court at Shah Alam for the murder of their maid through long period of abuse, neglect and starvation. They were both convicted and sentenced to death by the High Court.

[5] The applicants subsequently appealed to the Court of Appeal against the conviction which was heard and dismissed by the Court of Appeal. The Court of Appeal maintained both the conviction for murder and the death sentence.

[6] Aggrieved by the Court of Appeal's decision, the applicants appealed to the Federal Court. On 4 April 2018, the earlier panel set aside the conviction under s. 302 of the Code and substituted it with a conviction under s. 304(a) of the Code. The applicants were then sentenced to 20 years' imprisonment.

[7] This takes us to the present notice of motion (the application) for the review of the said decision made by the earlier panel that was heard by us on 16 May 2019.

The Applicants' Position

[8] The contention as we understand it is this. The applicants were charged under s. 302 of the Code read together with s. 34 of the same. In proving its case, the prosecution had relied on s. 300(d) which reads as follows:

A Except in the cases hereinafter excepted, culpable homicide is murder:

> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

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[9] That reliance was made clear in the opening statement of the prosecution and the learned High Court Judge had also treated the case in similar manner as can be seen in the following paragraph:

> To rely on section 300(d) of the Penal Code, it is incumbent upon the prosecution to prove the following elements:
>
> (1) The victim ie lsti Komariyah had died (element 1).
>
> (2) The death of lsti Komariyah is the result of the actions of Accused 1 and 2 in not:
>
> (a) providing food to the deceased; and
>
> (b) providing medical treatment to the deceased. (element 2); and
>
> (3) The actions were done without excuse (element 3).

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[10] In regard to element 3, the learned judge said this:

> From the injuries suffered by the deceased and also her physic from 49 kilogram to 25 kilogram and the fact that no medical attention was given which should have been done by a reasonable person especially the two Accused, Accused 1 as an employer and Accused 2 as the wife of an employer can be summed up as having the intention to just let whatever happened.
>
> The photographs P5 (5-14) show the deceased had external injuries which the Autopsy Report stated as totalling 39. The Report further stated that multiple blunt impact is one of the causes of the death.
>
> The external injuries in the deceased are consistent with being beaten and SP13, the son of both Accused stated in evidence that "sometimes they beat her with a balloon stick, I see my mum was beaten her with the yellow balloon stick."
>
> If both the Accused had acted as reasonable employer and wife of an employer, with all the marks of the body they should have provided her medical attention.

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[11] The analysis of the facts by the learned High Court Judge was accepted by the Court of Appeal.

[12] The earlier panel, however, took a different view of the factual matrix and found that a case under s. 300(d) of the Code had not been made out against the applicants. However, the earlier panel found the applicants guilty of culpable homicide and sentenced both of them under s. 304(a) of the Code.

I

This lies, as submitted by learned counsel, the crucial and fatal mistake committed by the earlier panel which had caused an injustice to the applicants.

[13] The mistake was this. When the earlier panel found that s. 300(d) was not proved, the applicants cannot be found guilty of culpable homicide under s. 304(a) which speaks of intention and not "knowledge" as required in s. 300(d). The correct provision under which the applicants should be found guilty of was simply s. 304(b) which also speaks of "knowledge" as is provided for in s. 300(d). And since the whole foundation of the prosecution's case and the rationale of both the High Court and Court of Appeal were premised on "knowledge" pursuant to s. 300(d), the earlier panel in reducing the charge against the applicants can only consider a substitution of conviction and sentence under s. 304(b) and not s. 304(a).

[14] Learned counsel referred us to this court's decision in the appeal of *Soh Chew Thong & Anor v. Pendakwa Raya* (grounds not available) in which the facts, according to learned counsel, are similar with the present case. In that case, the prosecution had relied on s. 300(d) of the Code as was done here, but when the Federal Court decided to reduce the charge, they substituted the conviction and sentence under s. 302 with s. 304(b) of the Code. Premised on that decision, learned counsel submits that the applicants must be treated equally as required under the law (arts. 5 and 8 of the Federal Constitution) and the applicants' conviction and sentence must therefore be substituted with a conviction and sentence under s. 304(b) of the Code.

[15] In view of the above, learned counsel submitted that we should exercise our power of review under r. 137 to correct this apparent injustice. Reliance is made on the case of *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901 where the Federal Court held as follows:

> [10] Following the above authorities, we are of the considered view that the inherent power of the court to review its decision as declared in r. 137 is a necessary power which is inbuilt or intrinsic in the court, as the court of justice. This power may be equated to the powers of the courts to dismiss an action for want of prosecution or to the power of court to strike out any pleading or indorsement of any writ in the action under the Rules of Court 2012. This inherent power is derived from the inherent jurisdiction of the court which is to do justice and to prevent any abuse of process. This power springs not from legislation but from the nature and constitution of the court as a dispenser of justice. And this inherent power can only be taken away by express provision in any written law.
>
> [11] The inherent power may be described as the power which is necessary for the proper and complete administration of justice and such power is resident in all courts of superior jurisdiction and essential to their existence. (See P Ramanatha Aiyar, *The Law Lexicon*, 2nd edn, reprint 2010). The rationale behind this inherent power is to safeguard the integrity of earlier litigation process and the correction of injustice.

[16] Learned counsel also refers to the Indian case of *Rupa Ashok Hurra v. Ashok Hurra* (2002) 4 Supreme Court Cases 388 where the court said:

> 47. The concern of this Court rendering justice in a cause is not less important than the principle of finality of its Judgment. We are faced with competing principles - ensuring certainty and finality of a Judgment of the Court of last resort and dispensing justice on reconsideration of a Judgment on the ground that it is vitiated being in violation of the principle of natural justice or giving scope for apprehension of bias due to a Judge who participated in the decision-making process not disclosing his links with a party to the case, or on account of abuse of the process of the Court. such a Judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice - a concept which is not dispute but a few. We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final Judgment to set right miscarriage of justice complained of. In such a case it would only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question, we are persuaded that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of justice as though it is essentially in the public interest that a final Judgment of the final Court in the country should not be open to declining to reconsider the Judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable injustice.

Our Decision

[17] In determining this application, the primary question we ask ourselves is simply this. Has the earlier panel's decision in convicting and sentencing the applicants under s. 304(a), after having found that a case under s. 300(d) had not been made out, contrary to any law so as to render it an illegal decision requiring the court to exercise its power of review under r. 137?

[18] Our starting point of deliberation is to look at the jurisdiction or power of this court in an appeal. The relevant provision of law is s. 86 of the Courts of Judicature Act 1964 (CJA) which reads:

> Save as this Act provided, in the exercise of its appellate jurisdiction, the Federal Court shall have the same jurisdiction, may exercise the same powers and may make any order as are had and may be exercised or made by the Court of Appeal or by the High Court.

[19] Section 86 of the Courts of Judicature is quite clear in that in criminal appeals, we possess the same powers as the High Court and Court of Appeal. What that simply means is that, we are duty bound (as in all criminal appeals) to evaluate the facts in its totality and then make a determination as to whether the conviction is safe. If we find that the conviction is unsafe, we are then duty bound to make a determination whether the evaluated facts justify a conviction under another provision of the Code, *to wit*, another criminal offence.

[20] Though there are no written grounds by the earlier panel, there is little doubt as to what the earlier panel did. Upon finding that s. 300(d) had not been proved, the earlier panel, as intimated by us earlier, then embarked on a process of re-evaluation of the facts and made a determination on which relevant provision under the Code were the applicants guilty of, upon the application of the fresh finding of facts.

[21] It cannot be disputed that in a circumstance where someone had been unlawfully killed, ss. 299 and 300 of the Code come into play. And consequently, when a court finds that a s. 300 offence (murder) has not been made out, s. 299 (culpable homicide) offences come into play (unless on the facts neither offence has been made out in which case there will be an outright acquitted) for the court to determine, based on the facts found, under which limb of s. 299 do the acts and omissions fall under.

Section 299 consists of three limbs:

(i) With the intention of causing death;

(ii) With the intention of causing bodily injury as is likely to cause death; or

(iii) With knowledge that he is likely by such act to cause death.

[22] That was what the earlier panel did. They evaluated the evidence again as they are empowered to do so under s. 86 of the CJA, in order to find guilt either under limb 1 or 2 or 3 of s. 299. If it is an offence under limb 1 or 2, then it would draw punishment under s. 304(a) of the Code. If it is a limb 3 offence, then it would draw punishment under s. 304(b) of the Code. For clarity, we reproduce s. 304 below:

> Punishment for culpable homicide not amounting to murder
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> 304. Whoever commits culpable homicide not amounting to murder shall be punished:
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> (a) with imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or
>
> (b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[23] Not only was the earlier panel fully entitled to revaluate the evidence afresh, it must adopt this approach for the simple reason that the ingredients set out in s. 299 and s. 300 of the Code vary in degree. One results in culpable homicide while the other is culpable homicide amounting to murder. Different considerations apply to each offence. The court's mind must then

focus on the totality of the evidence to determine which limb in s. 299 could the accused be found guilty of. Whatever discussions relating to the ingredients of s. 300(d) in the High Court and Court of Appeal are no longer of relevance in the process of determining guilt under s. 299 of the Code for culpable homicide. Here, the earlier panel eventually found that a s. 304(a) conviction is an appropriate sentence.

[24] In our minds, what the earlier panel did was perfectly in order and this court is entitled to do so in all criminal appeals brought before this court.

[25] Even if one takes the applicants' contention to their highest, that is, the earlier panel had wrongly applied the facts to the law, that does not meet threshold to order a review under r. 137. The law is clear. When there is a challenge on a decision premised on its merits whether on facts or law or where there is a divergent of opinions arising from application of a set of facts to a provision of law, this court would not exercise its power of revision. For this court to exercise its power to review, it can only be done under limited circumstances and they are listed in the recent judgment of this court in *Kerajaan Malaysia v. Semantan Estates (1952) Sdn Bhd* [2019] 2 CLJ 145; [2019] 2 MLJ 609, as per the followings:

> [51] To exercise its inherent power under r. 137 to review its own decision, the Court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstances. In *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & OrS And Other Applications* [2013] 4 CLJ 901; [2013] 4 MLJ 351, Arifin Zakaria CJ adopting the relevant passage in Abdul Hamid CJ's judgment in *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia Bhd)* [2008] MLJU 251, said:
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> > [15] ... this inherent jurisdiction must be exercised with circumspection in order to prevent any abuse of the same. We could not express this better than by adopting the words of Abdul Hamid CJ in *Asean Securities* which reads:
> >
> > > [4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had

disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken upon another appeal in a similar case.

That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts. (See: *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd Ors* [1986] 1 MLJ 166; *Adorna Properties Sdn Bhd v. Kobchai* [2006] 1 MLJ 417; *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application* [2005] 3 MLJ 1, in particular the dissenting judgment of Abdul Hamid Mohamad FCJ; *Tai Chai Yu v. The Chief Registrar of the Federal Court* [1998] 2 MLJ 474; *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29; [2005] 1 MLJ 101; and *Chu Tak Fai v. Public Prosecutor* [2007] 1 MLJ 201.)

[5] Coming back to r. 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 3 MLJ 771 and in *Sia Cheng Soon & Anor v. Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753. In the former case I concluded:

In other words, rule 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act and other statutes.

[6] However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused ...

In short, in no circumstances whatsoever, this jurisdiction should be used as an avenue of further appeal. (emphasis added.)

[52] *In Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 1090, Zaki Tun Azmi PCA (later CJ) said:

[39] There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as

A conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.

[40] Some of the circumstances in which this discretion should be exercised or not, are as follows:

B (a) that there was a Jack of quorum e.g. the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 MLJ 1);

(b) the applicant had been denied the right to have his appeal heard on merits by the appellate court (*Megat Najmuddin bin Dato Seri*
C *(Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385);

(c) where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673);

D (d) where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision (*Allied Capital Sdn Bhd v. Mohd Latiff Shah MoHd And Another Application* [2005] 3 MLJ 1);

E (e) clear infringement of the law (*Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2006] 1 MLJ 417);

F (f) it does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) (*Chan Yock Cher @ Chan Yock Kher v. Chan Teong Peng* [2005] 1 MLJ 101);

(g) where an applicant under r 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand v. Sukhraj Rai* [AIR] 1941);

G (h) where bias had been established (*Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353);

(i) where it is demonstrated that the integrity of its earlier decision had been critically undermined eg where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin* [2005] 3 All ER 550);

H (j) where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v. V Muthusamy*; [2007] 6 MLJ 485).

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[26] The case of *Soh Chew Thong & Anor v. PP (supra)* was relied on heavily by learned counsel for the applicants. We do not have the benefit of the grounds but it must be remembered that every decision of the courts depends substantially on the peculiarity of each case as the facts would invariably be different and subject to different inferences leading to different opinions of the courts. Even if the facts are the same, this court is entitled to make a fresh finding of fact in a guilt finding process. Further, this court is not bound by its own earlier decision especially when the appeal relates to finding of facts.

Conclusion

[27] The applicants had been sentenced to 20 years' imprisonment instead of a death sentence. Taking into consideration of the cruel treatment by one human being to another which eventually led to an untimely and tragic death of the latter, any reasonable tribunal would find the aforesaid imposed sentence to be appropriate as it reflected squarely on the seriousness of the offence. Both applicants had the benefit of three court hearings and legal representations hence one cannot say in fairness that there has been a miscarriage of justice.

[28] In sum, there was no error on the part of the earlier panel. Rather, the error lies on the part of the applicants who saw the nexus as between s. 304 Code and s. 300 Code, when in fact, the true nexus only exists between s. 304 Code and s. 299 Code. The language employed by the drafters in s. 299 Code cannot be clearer in terms of stipulating which offence it has been legislated to provide punishments for. To our minds, as alluded to in the preceding paragraphs above, s. 304 Code has nothing to do with s. 300 Code. It has everything to do with s. 299 Code.

[29] Accordingly, we dismiss the motion to review by the applicants.